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**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
DENISE JUNEAU
STATE OF MONTANA**

IN RE THE MATTER OF [STUDENT])	
)	CAUSE NO. OSPI-2016-01
)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND ORDER NUNC PRO TUNC
)	

On or about February 10, 2016, Petitioner [FATHER], the parent of [STUDENT], requested a due process hearing for [STUDENT], the student in this matter, against Respondent *** School District No. *** (School District). On February 24, 2016, the Office of Public Instruction appointed Hearing Officer Lisa Swan Semansky. A due process hearing was scheduled for April 18-20, 2016. The hearing concluded on April 19, 2016. On April 25, 2016 this Hearing Officer issued her ruling and decision.

Throughout these proceedings, [STUDENT] has been represented by his father, [FATHER], pro se. The School District was represented throughout the proceedings by ***.

On April 18 and 19, Hearing Officer Lisa Swan Semansky convened the Due Process Hearing at ***, Montana. [STUDENT] called the following witnesses: [FATHER], petitioner and FATHER of [STUDENT] and [GRANDMOTHER], Grandmother of [STUDENT] and mother of [FATHER].

The School District called the following witnesses: ***, [STUDENT]'s kindergarten teacher in 2014-15 school year; ***, [STUDENT]'s first grade and current teacher for the 2016 school year; ***, the principal of the elementary school that [STUDENT] attends; ***, the special education teacher at the school [STUDENT] attends; ***, Special Education Coordinator for the School District; and ***, Speech and Language therapist that provides services to [STUDENT].

Petitioner's Exhibits 1, 2, 3 were received into evidence without objection. Respondent's Exhibit A (composed of 91 pages), B (composed of 488 pages) and C (composed of 4 pages) were admitted without objection.

[STUDENT], through Petitioner, alleges that the School District violated [STUDENT]'s right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 through 1487 and 34 Code of Federal Regulations (CFR) §§300.500 through 300.536, implementing 20 USC § 1415. [STUDENT] contends that the School District failed to provide him with FAPE because the 2015-2016 Individual Education Program (IEP) team determined a self-contained classroom was necessary for [STUDENT] to progress in meeting his IEP goals for the school year. Second, [STUDENT] contends that the School District threatened to stop all special education services if [FATHER] refused to agree with the change in placement for [STUDENT]. [STUDENT] claims that the School District should provide educational services in the least restrictive environment which, [STUDENT] through Petitioner alleges would be to continue where [STUDENT] is currently placed.

The School District maintains that [STUDENT] was provided FAPE pursuant to the determination of the IEP team for placement of [STUDENT] in a self-contained classroom and that such placement is the least restrictive environment in which progress can occur for [STUDENT] for the school year 2015-2016 and that the School District never threatened to remove or cease providing special educational services to [STUDENT].

FINDING OF FACTS

1. [STUDENT] was born May 21, 2009. [STUDENT] resides with [FATHER], his father, at ***. (Exhibit C, Prior Written Notice).

2. [STUDENT] is enrolled in *** School District No. * and has been beginning August 2014. He was evaluated for eligibility identification on February 20, 2014 with a determination that special education and related services are necessary due to his attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD) and pervasive developmental delay (autism spectrum disorder). [FATHER] consented to this evaluation. (Exhibit B, pages 132-137). Both parties to this action agree that [STUDENT] was accurately identified as a student with a disability under the Individuals with Disabilities Education Act of 2004 (IDEA) and is entitled to receive a free appropriate public education. (T.R. 13).

3. During the 2014-2015 school year, [STUDENT] attended *** Elementary school which is part of the School District. [STUDENT]'s kindergarten teacher was *** and the Resource/Special education teacher was ***. [STUDENT] continues to attend this elementary school and for the school year 2015-2016, [STUDENT] began first grade with *** as his first grade teacher and *** continues to be his special education/resource room teacher.

4. It was also determined upon evaluation that [STUDENT] qualified for and would benefit from having speech/language therapy. (Exhibit B, pages 138). Both parties agree that providing [STUDENT] with these services have been needed and at least in part, provided [STUDENT] with a free and appropriate public education.

5. During [STUDENT]'s 2014-2015 school year, a behavior intervention plan was formulated for [STUDENT] which revealed that any progress made academically and socially was made when he had 1 to 1 instruction or supervision. (Exhibit B, pages 475-477, T.R. 79-82).

6. The resource room at *** Elementary currently serves approximately 37 students and 5 additional students are in the evaluation process and will be added to that roster. During [STUDENT]'s first grade year, at any time, there can be from 12 to 37 students present in the Resource Room which is staffed by the Special Education teacher *** and a number of paraprofessional (aides). Students are constantly entering and leaving the classroom which is distracting to [STUDENT]. (T.R. 181) [SPED TEACHER] believes that [STUDENT] would be better served in a Life Skills classroom; [STUDENT] needs small groups, more one on one and less distraction. (T.R. 179-189).

7. [SPED COORDINATOR] testified that not every school has self-contained classrooms in the school district. Self-contained classrooms are provided for children who need additional academic or behavioral support. If a student needs to be in a Resource Room 80% or more of the school day, the School District considers moving the student to a self-contained classroom. Self-contained classrooms contain fewer students and more staff. They typically have 10 or fewer students with 3-4 staff. The students in the self-contained classrooms remain together throughout the day. There are no other students coming in and out of the classroom during the school day. (T.R. 88-90).

8. [SPED COORDINATOR] testified that there are different types of self-contained classrooms: Life Skills, Independent Living and Delta classrooms. Life Skills classrooms are for

students who are a few grade levels behind their peers; they use a different curriculum which is educationally designed for them. (T.R. 90-91).

9. An IEP team meeting was initially held on October 20, 2015 for the 2015-2016 school year. (Exhibit B, pages 152-168). In addition to the regular team participants, [SPED COORDINATOR] attended. (T.R. 84). It was at this initial meeting that the team discussed the determination that a self-contained life skills classroom was needed for [STUDENT] to progress in his IEP goals. The meeting was stopped due to lack of meaningful progress by the team members, specifically [SPED COORDINATOR] and [FATHER]. A second team meeting was convened on November 10, 2015 with the same team members present (Exhibit B, page 167). During that team meeting other options were discussed by the team, one of which was a half-day at the school [STUDENT] was currently attending. Although the parties disagreed as to who could or would halt special education resources to [STUDENT], this option was also presented. Again, the meeting was adjourned without the IEP being signed. A third team meeting was held on December 21, 2015 with all members of the team present during which [FATHER] conditionally signed the IEP, not giving his consent for the self-contained classroom at another school, which would have resulted in a change in placement. (T.R. 31-32).

10. The current IEP (Exhibit B, page 165(a)) indicates the number of minutes per week that [STUDENT] spends in the “resource room” with [SPED TEACHER] and aides. Currently, the number of minutes per week equal approximately 80% of a regular school day. (T.R. 194-195). Clearly [FATHER] was not aware of that because of the time that [STUDENT] was spending in special education, he was not spending time with his classmates in “specials” which for this school are recess, P.E. music, and library. (T.R. 198-199). [FATHER] denied knowing that this was the case with [STUDENT] and school personnel are equally adamant that this was explained at the IEP meetings. (T.R. 198-199).

11. [SPED TEACHER] and [SPED COORDINATOR] testified that during the 2014-15 school year, [STUDENT] engaged in verbally and physically disruptive behaviors that affected not only his ability to learn but negatively impacted the other students in the classroom. (T.R. 193, 246-247). Office Referrals (what during the hearing was referred to as “pink slips”) were made concerning [STUDENT] (Exhibit A, pages 69-79). The behaviors were so distracting and inappropriate that a behavior plan for [STUDENT] was developed by staff in an effort to assist them and [STUDENT] in his social and academic learning. (T.R. 197-198, Exhibit B,

pages 475-477). [SPED TEACHER] and [SPED COORDINATOR] testified that this plan was followed by staff. (Id.). [SPED COORDINATOR] testified as to how the plan was further implemented with the behavior support specialist to determine the level of assistance [STUDENT] required in order to progress in his IEP goals. (T.R. 77-78). During this school year, despite the procedures in place, and the time spent in the special education resource room, [SPED TEACHER] and [SPED COORDINATOR] testified that little, if any, progress was made by [STUDENT] academically or socially. (T.R. 244-245, 179-180, Exhibit B, pages 203-215).

12. In the fall of [STUDENT]'s first grade year, the IEP team determined that [STUDENT] should be placed in a self-contained Life Skills classroom and drafted the IEP to include this change in placement. The recommendation to place [STUDENT] in a self-contained classroom was based on his behavioral issues and his failure to progress academically. (T.R. 200). Special Education teacher *** testified that she led the 2015-2016 IEP meeting. She reviewed the entire IEP with the team, carefully explaining the assessments, data, lack of progress, and other information contained in the draft IEP. (School District Exhibit B 152-168.)

13. [SPED COORDINATOR] testified that the school district looked at the four elementary self-contained Life Skills classrooms within the School district and determined that the best placement for [STUDENT] would be in a self-contained Life Skills classroom at *** Elementary. The factors the school district considers are appropriateness of the classroom for meeting the child's individual needs, student numbers in the classroom, and proximity to the student's home school. There were only 5 students in the self-contained classroom at *** Elementary staffed by 1 teacher and 2 aides so [STUDENT] would get the most support with the smallest class size. There was a self-contained classroom at *** Elementary which is closer than *** Elementary; however, the self-contained classroom at *** Elementary already had 9 students. The other two classrooms were not available.

14. [FATHER] testified that he and his mother have attended all of the IEP meetings concerning [STUDENT]. He does not dispute that [STUDENT] needs special education and in fact, became quite emotional about [STUDENT] continuing to receive special education. [GRANDMOTHER], [FATHER]'s mother testified that [FATHER] has disabilities himself and is a single parent. (T.R. 47). As a result of the treatment [FATHER] received as a child in a self-contained classroom, he does not want [STUDENT] to be placed in a self-contained classroom. He fears for [STUDENT]'s safety. (T.R. 21-22). Based upon testimony presented at

hearing, [FATHER] and [SPED COORDINATOR] clashed at the IEP meetings, resulting in two of the meetings adjourning without an IEP signed. (T.R. 204). Both [FATHER] and [GRANDMOTHER] testified that the three options that were given to them were to move [STUDENT] to a self-contained classroom, [STUDENT] would attend half days at school, or the removal of resources for [STUDENT]. (T.R. 203-204). [SPED COORDINATOR] and [PRINCIPAL] testified that these were the options presented at the IEP meetings with the exception that the resources would be removed only if the parent withdrew his consent for services. Given the emotion involved in hearing the three options presented this hearing officer finds it more credible that the options were presented as all of the school district's witnesses testified, which was as [SPED COORDINATOR] testified, rather than as [FATHER] and [GRANDMOTHER] testified. It was equally clear from the testimony presented that no services have been halted or discontinued since the IEP was signed in December 2015. (Tr. 483-484; Exhibit A and B).

15. [FIRST GRADE TEACHER] testified as to the amount of time [STUDENT] spends in the regular classroom and the disruption that occurs as a result. (T.R. 255-258). [FIRST GRADE TEACHER] has not seen any improvement in his performance over the first grade school year. [STUDENT] is not able to access anything independently at grade level. [STUDENT] is a safety risk to himself and others. (T.R. 258-261).

16. The School District also formulated a behavior intervention plan for [STUDENT] for the 2015-2016 school year. (Exhibit B, pages 467-470).

17. All witnesses who testified were all at the IEP meetings held for the 2015-2016 school year and they all agreed that the first two meetings became quite contentious, with [FATHER] leaving and coming back and angry and loud voices raised by [FATHER] and [SPED COORDINATOR]. There is no dispute, however, that the IEP was signed and based upon the recommendation of the IEP team and [FATHER]'s disagreement with it, the change in placement from the classroom and "resource room" scenario that [STUDENT] has had for the prior year and the beginning of this current year, was recommended and therefore the School District needed to send a prior written notice of the change of placement recommendation. (T.R. 113-120).

18. [STUDENT] had problematic behaviors in the school setting that were documented by his teachers. (Exhibit A, pages 24-68, 88-89). Documented behaviors included

physical impulsivity and inability to keep his hands and feet to himself, verbal defiance and whining/crying, refusal to follow direction, and hyperactivity. (Id.). He also had office referrals (pink slips) that documented the behaviors that resulted in administration taking some action. (Exhibit A, pages 69-87, 91, Petitioner's Exhibit 3).

19. [FATHER] testified that he thinks that the School District makes all issues that arise with [STUDENT] to be [STUDENT]'s fault even when other students are involved. (T.R. 14-15). Based upon the testimony provided by the principal, ***, as well as the lack of communications between [FATHER] and the teachers, I find that the principal and teachers are reporting, investigating and handling the behaviors and challenges that [STUDENT] presents appropriately and in accordance with providing [STUDENT] with FAPE.

20. As a result of the signing of the IEP with the exception by [FATHER], the School District, within fifteen days, sent [FATHER] a letter and Prior Written Notice. (Exhibit C, Exhibit B, pages 152-175, Exhibit A, page 90). In the prior written notice the school noted that [STUDENT] is capable of learning but at a much slower rate of learning than a typical student; his behavior adds to his issues. [STUDENT] has shown no growth in his Social/Behavioral abilities which are at a 3-year-old level (Exhibit B, 169-182, 203-215, 238-264, 277-283, 296-308, 319-324 and 335-343) and his behaviors include making robot noises, roaming, out of his seat, being loud and trying to talk to other kids. 50% of the off task time is very disruptive (crying, screaming, throwing things).

21. Upon receipt of the Prior Written Notice, [FATHER] filed his petition for due process. [STUDENT] continues to receive services as provided in his current IEP at [the Elementary School].

22. The Prior Written Notice provided the assessments, evaluations and amount of time [STUDENT] spends in special education, as well his failure to make adequate progress toward his IEP goals as indicated in his current IEP. The Prior Written Notice also indicated that despite the School District's attempts to verbally explain the reasons and resources available to [STUDENT] in this new placement, [FATHER] refused to consider or listen to these explanations. (Exhibit C).

23. The Prior Written Notice indicated that the classroom would have fewer students, smaller student to teacher ratio, less distraction and more staff support. (Exhibit C).

24. The Prior Written Notice did not specify which school [STUDENT] would be transferred to but testimony at hearing made it clear that [FATHER] knew what the location and identification of the school that was to be the one that [STUDENT] would attend when the change in placement occurred. The notes of the second meeting of the team on November 11, 2015 indicate that the location of the new school was known and discussed at that time. (Exhibit B, page 167). Therefore, it was clear that [FATHER] and his mother were aware of what school was the new placement. During the due process hearing,*** [GRANDMOTHER] explained that *** Elementary would pose difficulties for the family, primarily surrounding transportation issues ([FATHER] does not drive). The School District through [SPED COORDINATOR'S] testimony indicated that it can accommodate the [FAMILY'S] concerns about transportation. First, she testified that transportation to and from school is provided. If there is a need during the school day for transportation and [GRANDMOTHER] is not available for transportation, the school district (the principal or school resource officer) would transport the child. Generally, in a self-contained classroom, there is a reduction in behavioral problems and children are not sent home as often, if at all. It is usually only because of illness that a child would need to be sent home. (TR 70-72, 4/19/2016).

25. The IEP indicates that [STUDENT]'s behavior impedes his learning or that of others. [FATHER] voiced no disagreement of that factor.

26. During the hearing, [SPED COORDINATOR] testified that in the self-contained life skills classroom, there would be recess and other "specials," like library and P.E. because the class would participate in those activities together. (T.R. 76-79 4/19/2016).

27. [FATHER] and his mother, [GRANDMOTHER], have no trust in the School District and view with great distrust anything that the School District wants to change for [STUDENT]. However, at the same time, it is equally clear, based upon their testimony, that [FATHER] wants his son educated and safe and able to participate in the other services provided by schools for children, including social interaction.

28. This hearing officer found the testimony of the teachers about [STUDENT]'s academic progress and implementation of the behavior plans with [STUDENT] to be persuasive and gave their testimony much weight. See, *McAllister v. Dist. of Columbia*, 53 F.Supp. 3d 55 (DDC 2014); *Sebastian M. v. King Philip Regional School District*, 685 F.3d 79 (1st Cir. 2012).

29. In summary, the IEP developed for [STUDENT] during the 2015-16 school year resulted in the IEP team making a recommendation for a self-contained life skills classroom, which due to the School District and where it has self-contained classrooms, requires [STUDENT] to move to another school building within the School District, which is a change in placement. However, in light of the assessments, evaluations and lack of progress academically and behaviorally that [STUDENT] has made, this change in placement continues to be a least restrictive environment for [STUDENT].

30. The evidence establishes that [STUDENT] needs special education instruction and related services delivered in a particular manner due to his particular disabilities. Because of his autism, and other health related disabilities, [STUDENT] needs specialized instruction, behavior modification and interactions with a high level of supervision and constant coaching and feedback to develop pro-social behaviors that will enable him to achieve his academic IEP goals.

31. In reviewing the testimony and evidence presented, this hearing officer finds that the Prior Written Notice provided [FATHER] was necessary due to the change in placement and that it provided the necessary information required by the statutes and regulations of the IDEA. This hearing Officer further finds that the proposed self-contained life skills classroom is the least restrictive environment for [STUDENT] at this time.

32. This hearing officer further finds that accommodations concerning classroom, teachers, structure of the class and transportation are appropriate and must be provided to [FATHER] so that he can be reassured that not only is this an appropriate placement for [STUDENT], but that [STUDENT] will be safe, accessible to [FATHER] or [GRANDMOTHER] (transportation will be established) and progress in academic and behavior provided to [FATHER]. The School District testified that these accommodations and procedures would be put in place and I find them to be necessary in this case.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

1. The Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference.

2. This case arises under the Individuals with Disabilities Education Act of 2004 (IDEA), 20 U.S.C. §§ 1400 et. seq. The primary purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . .” 20 U.S.C. § 1400(d)(1)(A) (2004).

3. The IDEA has been implemented on the federal level by the adoption of regulations found at 34 C.F.R. Part 300.

4. Under Montana law, a child is entitled to attend school “when the child is 6 years of age or older on or before September 10 of the year in which the child is to enroll but is not yet 19 years of age.” Mont. Code Ann. § 20-5-101(1)(a). A child with a disability, who is 6 years of age or older and under the age 19, is entitled to receive special education services. Mont. Code Ann. § 20-7-411(2).

5. The IDEA also mandates that FAPE be available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive. 20 U.S.C. § 1412(a)(1)(2004).

6. The term “free appropriate public education” or FAPE means that a disabled student is entitled to have an individual educational program (IEP) that is tailored to his particular needs. An IEP is a written statement of the special education, related services, and accommodations the school will provide, which is prepared at a meeting attended by a qualified representative of the school district, a teacher, the child’s parents or guardians, and when appropriate, the child himself. 20 U.S.C. §1401(20)(2004). *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 368 (1985); see also, 20 U.S.C. §§ 1411-1420; 34 CFR § 300.17. The IEP is a comprehensive statement of the educational needs of a student and the specially designed instruction and related services that will be employed to meet those needs.

7. The U.S. Supreme Court has defined what constitutes FAPE in *Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The Supreme Court set forth a two-fold inquiry. The first inquiry is whether the educational agency has complied with the procedures required under the IDEA. This requires a determination of whether the school district has created an IEP that conforms with the requirements of 20 U.S.C. § 1414. The second inquiry is whether the IEP developed through such procedures is reasonably calculated to meet the child’s unique needs and enable the student to receive educational benefit.

Rowley, at 181, 206-07. The IEP must provide personalized instruction and sufficient support services to enable the child to benefit from the instruction. *Id.* at 189, 194.

8. The FAPE tailored by the IEP team and described in an IEP, however, need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982). In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit." *Id.* at 201. Still, the educational benefit which the IDEA contemplates and to which an IEP must be geared cannot be "a mere modicum or de minimis;" rather, the IEP must be "likely to produce progress, not regression or trivial educational advancement." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248. In short, the educational benefit that an IEP is designed to achieve must be "meaningful." *Id.*

9. The term "educational benefit" is broadly defined and includes a student's social, emotional and behavioral needs. *Seattle Sch. Dist.*, 82 F.3d at 1500 (9th Cir. 1996); see also, H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.

10. The IDEA embodies an elaborate system of procedural safeguards, the importance of which "cannot be gainsaid." *Rowley* at 205. Procedural compliance is essential to ensuring that every eligible child receives a FAPE. *Amanda J. v. Clark County School*, 267 F.3d 877, 891 (9th Cir. 2001).

11. The IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting in accordance with 34 CR §§ 300.320 through 300.324. The IEP must include, among other components: 1) a statement of the child's present levels of academic achievement and functional performance; 2) a statement of measurable annual goals designed to meet the child's needs; 3) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; 4) a statement of the program modifications or supports for school personnel; and, in the case of a child whose behavior impedes learning, a consideration of the use of positive behavioral interventions and strategies, and other strategies, to address that behavior.

34 C.F.R. §§ 300.320(a) and 300.324(a)(2); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

12. To determine whether the School District offered [STUDENT] FAPE, the analysis must focus on the adequacy of the School District's proposed program. If the School District's program was designed to address [STUDENT]'s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the School District provided FAPE, even if [STUDENT]'s parent preferred another program. *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal. Ofc. Admin. Hrngs. Case No. 2006010204.

13. Pursuant to 34 CFR 300.114(a)(2), each public agency must ensure that (i) to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and (ii) special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This mandate must be made on a case-by-case basis. *L. v. North Haven Bd. Of Educ.* 52 IDELR 254 (D. Conn. 2009). Thus, while including students in the regular classroom as much as practicable is a central goal of IDEA, that goal must be attempted to be achieved in light of the equally important objective of providing an education appropriately tailored to each student's particular needs. *P. v Newington Bd. Of Educ.* 51 IDELR 2 (2 Cir. 2008).

14. Based upon the undisputed testimony of [STUDENT]'s special education teacher, regular education teacher and the principal of the school, [STUDENT] currently spends about 80% of his day in the resource room without making meaningful academic or social progress. Therefore, the school district correctly concluded [STUDENT] could not be satisfactorily educated in a mainstream setting and needed to be placed in a self-contained classroom. In reaching this conclusion, the school was seeking to place [STUDENT] in the least restrictive environment (LRE) and providing FAPE. *Broward County Sch. Bd.*, 112 LRP 56977 (SEA FL 08/16/12).

15. The School District must ensure that a continuum of alternative placements is available to meet the needs of [STUDENT]. 34 CFR 300.115. This continuum ranges from least restrictive (regular classroom) to most restrictive (institutional setting). 300.115(b)(1). Based on

the continuum model the concept of LRE addresses the placement that a child is provided and not the particular services that may be provided to further support the child's unique needs. Poway Unified Sch. Dist. 37 IDELR 174 (SEA CA 2002). Based upon the testimony by [SPED COORDINATOR] the IEP team considered the placement for [STUDENT] when consideration of his progress based upon his prior year's IEP was reviewed. [STUDENT]'s behavior intervention plan of the previous year was also considered.

16. Subsequent evidence of progress or lack of progress may be a relevant factor in determining the appropriateness of the IEP at the time it was made, but it is not outcome determinative. There is reliable evidence that [STUDENT] made almost no academic progress to date during his 2014-2015 school year at [elementary school]. (Exhibit B, pages 152-167). The testimony of the special education teacher as well as the regular education teachers support the Present Levels of Academic Achievement and Functional Performance and Measurable Annual Goals provided in his current IEP.

17. Behavior intervention programs must be written with sufficient specificity and must address the student's behaviors and possible consequences with consideration of the student's individual needs. *Kingsport City Sch. Sys. v. J.R.*, 2008 U.S. Dist. LEXIS 78704, 51 IDELR 77 (E.D. Tenn. 2008) (finding a denial of FAPE where the BIP was not appropriate for behavior management needs of the student); *New York City Dep't of Educ.*, 49 IDELR 270 (SEA NY 2008) (holding that without appropriate behavior interventions in place, the child could not receive a meaningful educational benefit in a school district program).

18. If the behavior of a student impedes his learning or the learning of other children, the IEP team must consider the use of positive behavioral interventions, supports and other strategies to address that behavior. 20 U.S.C. 1414(d)(3)(B)(I); 34 C.F.R. 300.324(a)(2)(I) and (a)(3)(I).

19. A student with disabilities may be removed from the general education environment only when education there with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(a)(2)(ii). To make this determination, a balance of the following must be made: 1) academic and non-academic benefits of inclusion; 2) the effect on teachers and classmates; 3) cost. *Sacramento City Unified Sch. Dist. V. Rachel H.*, 20 IDELR 812 (9th Cir. 1994), cert. denied, 512 U.S. 1207. In light of the testimony and exhibits which indicate the level of this student's needs and lack of meaningful progress both

academically and socially, the School District's recommendation to place [STUDENT] in its self-contained life skills classroom is the most appropriate and LRE. *D.W. v. Milwaukee Pub. Sch.* 61 IDELR 32 (7th Cir. 2013).

20. An IEP that does not address appropriately behavior that impedes a student's learning denies the student a FAPE. See e.g., *Neosho R. v. Sch. Dist. v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003); *Lauren P. v. Wissahickon Sch. Dist.*, 310 Fed App'x 552, 554-55 (3rd Cir. 2009) (concluding that defendant's "failure to address [the child's] behavioral problems in a systematic and consistent way denied [her] a FAPE."); *Penn Trafford Sch. Dist. v. C.F.*, 2006 U.S. Dist. LEXIS 13581, 2006 WL 840334, at *8 (W.D. Pa. 2006) (finding the failure to "provide a behavior management plan" through the IEP "a serious omission"); *G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 466-467 (E.D. Pa. 2011).

21. The School District's determination that [STUDENT] was not succeeding in meeting his IEP goals in his current placement required the School District to consider other options. The School District's special education coordinator, [STUDENT]'s special education teacher and failure of the behavior intervention plan to adequately assist [STUDENT] in conforming his behavior so that he was not impeding his and other students' learning resulted in the option of a self-contained life skills classroom. [FATHER]'s refusal of this service required the School district to act in order to continue to provide FAPE to [STUDENT]. This resulted in the School District sending a Prior Written Notice to [FATHER]. (Exhibit C). See, *Letter to Richards*, 55 IDELR 107 (OSEP 2010).

22. 34 CFR 300.503(b) requires that a prior written notice must include a description of the action proposed by the school district; an explanation of why the school district proposes the action to be taken; a description of each evaluation procedure, assessment, record or report the School district used as a basis for the proposed action; a statement that the parents have protection under Part B's procedural safeguards, and where a copy of these safeguards may be obtained; sources for parents to contact to obtain assistance; any other options that the IEP team considered; and a description of other factors relevant to the school district's proposal. This prior written notice must be written in such a way as to be understandable to the general public. 300.503(c). The prior written notice is intended and must inform the parent. *Smith v. Squillacote*, 19 IDELR 265(D.D.C. 1992). Based upon the prior written notice (Exhibit C) and testimony presented in this case, this hearing officer concludes that the prior written notice

provided to [FATHER] was adequate, informed him and provided him with sufficient information concerning the change in placement for [STUDENT]. *Marcus I. v. Hawaii Dept. Educ.*, 63 IDELR 245 (9th Cir. 2014); *T.Y. v. NewYork City Dept of Educ.* 53 IDELR 69 (2nd Cir. 2009) cert. denied 110 LRP 28696, 130 S.Ct. 3277 (2010).

23. Given the fact that one aspect of [STUDENT]'s disability is autism spectrum, a change in physical location of services results in a change in placement. Therefore, the School District had to follow the IDEA's placement procedures before transferring the student. *P.V. v. School Dist. Of Philadelphia*, 60 IDELR 185, (E.D. PA 2013). Moreover, the School District can assign a child to a school where a necessary service is located rather than move the service to the student's neighborhood school. *Adams-Arapahoe Sch. Dist. 28J*, 65 IDELR 89 (SEA CO 2014); *Deer Valley Unif. Sch. Dist. v. L.P.* 61 IDELR 48 (DC Ariz 2013).

24. Under the IDEA, the burden of proof in an administrative hearing as to whether a child has received FAPE is on the party seeking relief, which in this case is [STUDENT]. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531 (2005); this is equally true if the issue is whether placement is the least restrictive environment for the student. *L.E. v. Ramsey Bd. Of Educ.*, 435 F.3d 384 (3rd Cir. 2006).

25. This Hearing Officer has heard all the evidence, weighed it thoroughly, and has determined that [STUDENT] was provided FAPE by the School District pursuant to the 2015-16 IEP, Prior Written Notice and change in placement.

26. The issue of denying or withdrawing special education services to [STUDENT] did not and has not occurred in this matter; therefore, there is no basis for a ruling on whether that was threatened or a misunderstanding occurred between [FATHER] and School District.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The IEP shall be implemented as it provides FAPE to this child.
2. Within 10 days of the date of this Order, the School District shall arrange for [FATHER] to meet the teacher of the self-contained life skills classroom, administrative staff at the school where the self-contained life skills classroom is located; transportation arranged and established to the new school; and a transition period for the change in placement to occur.
3. [STUDENT] continues to be entitled to all the procedural and substantive protections of the IDEA.

DATED this 25th day of April, 2016.

LISA SEMANSKY
HEARING OFFICER

CERTIFICATE OF SERVICE

I certify, under penalty of perjury, that a true and correct copy of the foregoing FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER NUNC PRO TUNC duly served upon the respective attorneys for each of the parties entitled to service by emailing and depositing a copy in the United States mail at Great falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

[FATHER]

[DISTRICT'S ATTORNEY]

Linda Brandon-Kjos (original) lbrandon@mt.gov
Office of Public Instruction
Legal Division
P.O. Box 202501
Helena, MT 59620-2501

DATED this 25th day of April, 2016.

Lisa Swan Semansky,
Hearing Officer